85-2120 No.

JUN 25 1986

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD R. WHEELER,
PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BROOKS B. LA GRUA
Colonel, Judge Advocate General's Corps (JAGC)
United States Army
Defense Appellate Division
Nassif Building
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

ARTHUR L. HUNT
Lieutenant Colonel, JAGC
United States Army

ANNAMARY SULLIVAN
Captain, JAGC
United States Army

DAVID L. CARRIER
Captain, JAGC
United States Army

20 pp

QUESTION PRESENTED

WHETHER the military interrogator's custodial manipulation of a mentally impaired individual's strong religious beliefs rendered his resulting self-incriminatory statements involuntary.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	7
Appendix A	1a
Appendix B	7a

TABLE OF AUTHORITIES

Cases:

Blackburn v. Alabama, 361 U.S. 199 (1960)	5
Brewer v. Williams, 430 U.S. 387 (1977)	4, 6
Bumper v. North Carolina, 391 U.S. 543 (1968)	6
Chapman v. California, 386 U.S. 18 (1967)	7
Davis v. North Carolina, 384 U.S. 737 (1966)	4, 5, 6
Fahy v. Connecticut, 375 U.S. 85 (1963)	7
Fikes v. Alabama, 352 U.S. 191, *reh. den.*, 352 U.S. 1019 (1957)	5
Gessner v. United States, 354 F.2d 726 (10th Cir. 1965)	6
Lego v. Twomey, 404 U.S. 477 (1972)	4
Lynumn v. Illinois, 372 U.S. 528 (1962)	5
Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985)	6
Miranda v. Arizona, 384 U.S. 436 (1966)	3, 4, 6
Payne v. Arkansas, 356 U.S. 560 (1958)	5
People v. Adams, 143 Cal.App.3d 970, 192 Cal.Rptr. 290 (1983)	6
Reck v. Pate, 367 U.S. 433 (1961)	5
Rogers v. Richmond, 365 U.S. 534 (1961)	5
Stein v. New York, 346 U.S. 156 (1953)	5
Townsend v. Sain, 372 U.S. 293 (1963)	5

Cases – Continued Page

United States v. Duga, 10 M.J. 206 (C.M.A. 1981) 6

United States v. Griffin, 15 C.M.A. 135, 35 C.M.R. 107 (1964) 6

United States v. Remai, 19 M.J. 229 (C.M.A. 1985) 6

United States v. Molinary-Rivera, 13 M.J. 975 (A.C.M.R. 1982) 6

United States v. Wheeler, 22 M.J. 76 (C.M.A. 1986) 1

United States v. Wheeler, 18 M.J. 823 (A.C.M.R. 1984) 1

Constitution and Statutes:

U.S. Constitution:
Amendment V 1, 3

Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982)
Article 31 ..... 2, 3

28 U.S.C. § 1259 1

Other Authority:

Military Rule of Evidence 304 ..... 2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD R. WHEELER,
PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Richard R. Wheeler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 22 M.J. 76 (C.M.A. 1986) (Appendix A). The opinion of the Army Court of Military Review is reported at 18 M.J. 823 (A.C.M.R. 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 28, 1986, affirming petitioner's conviction dated December 13, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

The Uniform Code of Military Justice provides:

Article 31, 10 U.S.C. § 831 (1982):

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> . . . .
>
> (d) No statement obtained from any person in violation of this article, or through use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Military Rule of Evidence 304(e) provides:

> (e) *Burden of Proof.* When an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. . . .
>
> (1) *In general.* The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence.

STATEMENT OF THE CASE

Petitioner was charged with raping Teri Collins on August 8, 1983, once in the vicinity of Tacoma, Washington and again on Fort Lewis, Washington. He was also accused of raping Grace Ngirmeker in Tacoma and of raping and sodomizing her on Fort Lewis, on September 9, 1983. On September 15, 1983, Ms. Ngirmeker identified petitioner in a photographic line-up conducted by Detective Correll of the Tacoma Police Department (R. 129-31). Based on this information, Army Criminal Investigation Command (CID) agents apprehended petitioner later that day (R. 106).

Correll and CID Special Agent (SA) Herring together interrogated petitioner for an hour at Herring's Office on Fort

Lewis (R. 25, 30-31, 108).[1] Throughout the hour of joint interrogation (R. 25, 30-31), petitioner denied any involvement (R. 29, 107). Correll then left petitioner alone with his military interrogator (R. 31, 108). Petitioner soon mentioned that he had been praying to God about an unspecified "problem" (R. 31, 123). Special Agent Herring responded that he and God knew of petitioner's problem (R. 31). As petitioner began to weep, Herring invited him to pray to God for strength to "go ahead and get this off [his] chest . . ." (R. 32, 124). Special Agent Herring then knelt before petitioner, who joined him on the floor (R. 124). Petitioner, on his knees and weeping, turned his eyes upward and said, "I didn't mean to do it. I didn't mean to attack those women, God, I need help and strength." (R. 32, 124). After a moment, petitioner and SA Herring retook their seats and petitioner gave a full account of the Ngirmeker offenses (R. 32-33a, 124-25, Prosecution Exhibits 3 and 4).

According to his psychiatrist, Dr. (Major) Schilt, petitioner suffered from a schizotypal personality disorder (R. 255). Petitioner was somewhat paranoid; he believed in magical thinking and that a former girlfriend controlled him through a curse (R. 257). At trial, petitioner rambled disjointedly (R. 275-81).

Pursuant to defense motion, the offenses which transpired in Tacoma were dismissed for lack of jurisdiction (R. 38-39). A defense motion *in limine* to exclude the petitioner's statements as involuntary was denied (R. 40). Contrary to his pleas, petitioner was convicted of the forcible sodomy of Grace Ngirmeker and the rapes of Ms. Ngirmeker and Ms. Collins and sentenced to a dishonorable discharge, confinement at hard labor for life, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. The

---

[1] Before questioning, each officer advised petitioner of his rights under the fifth amendment and Miranda v. Arizona, 384 U.S. 436 (1966). SA Herring additionally informed petitioner of his rights under Article 31, Uniform Code of Military Justice, 10 U.S.C. § 831 (1982); each secured a printed rights waiver (R. 24-29; 107-08; Prosecution Exhibits 1 and 2). Petitioner, however, did not recall being informed that he could terminate the questioning and believed that he could not (R. 21).

lower appellate courts have considered the issues presented in this petition. As a prerequisite to the Court's jurisdiction, the Court of Military Appeals granted on the following issue:

> WHETHER THE APPELLANT'S STATEMENT WAS THE PRODUCT OF PSYCHOLOGICAL COERCION AND THEREFORE INVOLUNTARY.

REASONS FOR GRANTING THE WRIT

In order for an accused's statements given to the police during interrogation to be used against him, the government must prove by a preponderance of the evidence that those statements were made voluntarily, after proper advice as to the right to counsel and the right to remain silent. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Lego v. Twomey*, 404 U.S. 477 (1972); Military Rule of Evidence 304. The military judge erroneously determined that the government met this burden despite the uncontested evidence that petitioner's statements directly resulted from the military interrogator's custodial manipulation of a weak-minded individual's strong religious beliefs. In affirming the military judge's determination, the Court of Military Appeals misapplied the Court's decisions in *Davis v. North Carolina*, 384 U.S. 737 (1966) and *Brewer v. Williams*, 430 U.S. 387 (1977) by failing to give proper weight to the military interrogator's use of religious inducements when considering the totality of the circumstances surrounding petitioner's statements.

I. PETITIONER'S STATEMENTS WERE INVOLUNTARY

At trial it was uncontested that petitioner suffered from a schizotypal personality disorder (R. 255) and that he sought refuge from the pain of his disastrous family and social life and the guilt of his actions in a search for Jesus (R. 275-81). "I've been praying everyday. Ask Jesus to come into my heart. Come into my heart, please. But, I get up, and I still feel the same." (R. 281). His military interrogator exploited this unusually intense spiritual yearning by holding open the possibility of spiritual redemption if petitioner would confess.

The Court has long held that an invalid confession need not be the result of physical torture or otherwise abusive police techniques. It is the "totality of the circumstances" which must be examined to determine whether the confession is the product of an affirmative choice by the accused. *Fikes v. Alabama*, 352 U.S. 191, 197, *reh. den.*, 352 U.S. 1019 (1957). *Accord, Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). Fundamental fairness precludes a conviction predicated on a confession obtained through the custodial manipulation of a mentally impaired individual's strong religious beliefs.

A voluntary confession is "the product of a rational intellect and a free will." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). Psychological pressures or physical intimidation, conversely, lead to coerced to self-incrimination. *Townsend v. Sain*, 372 U.S. 293, 307 (1963). Despite an early emphasis on threatened or actual physical abuse[2] and the resultant confession's dubious reliability, the focus has shifted to a consideration of psychological coercion and its due process ramifications. *Rogers v. Richmond*, 365 U.S. at 541.[3] An accused's idiosyncratic weaknesses may not be exploited to overbear his will. *Blackburn v. Alabama*, 361 U.S. at 207-08.

Each inquiry into the totality of circumstances where psychological coercion is at issue must focus closely on the individual's potential to resist and to exercise his free will. "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." *Stein v. New York*, 346 U.S. 156, 185 (1953).

Petitioner is "of low mentality if not mentally ill," *Fikes v. Alabama*, 352 U.S. at 196; he suffers from a mental disorder

---

[2] *See e.g.* Payne v. Arkansas, 356 U.S. 560 (1958) (threats); Reck v. Pate, 367 U.S. 433 (1961) (physical deprivations).

[3] *See e.g.* Davis v. North Carolina, 384 U.S. at 752 (16 days of intermittent custodial interrogation; religious appeal); Lynumn v. Illinois, 372 U.S. 528, 534 (1962) (threatened termination of parental rights and state aid to children).

(R. 255) and his General Technical test[4] score is only 85 (Prosecution Exhibit 52). He was subjected to inherently coercive custodial interrogation by two police officers, *see Miranda v. Arizona*, 384 U.S. at 455-58, a coercion enhanced by the fact that petitioner is a soldier, subject to the well-recognized, albeit "subtle," pressures of military society. *See United States v. Remai*, 19 M.J. 229, 233 (C.M.A 1985); *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981). Finally, petitioner was subjected to religious appeals which ultimately overbore his weak will. The extraordinary power of such an interrogation technique has led at least one court to ban its use. *People v. Adams*, 143 Cal.App.3d 970, 192 Cal.Rptr. 290 (1983). The Court has also recognized the efficacy that spiritual entreaties may have, without holding that such stratagems are *per se* coercive. *Davis v. North Carolina*, 384 U.S. at 751; *Brewer v. Williams*, 430 U.S. 387, 412 (1977) (Powell, J., concurring). *See Martin v. Wainwright*, 770 F.2d 918, 925 (11th Cir. 1985); *Gessner v. United States*, 354 F.2d 726 (10th Cir. 1965).

Thus, the totality of the circumstances in this case, *i.e.*, petitioner's mental disorder, his religious attitude, his military training to obedience of authority, and the inherent coercion of custodial interrogation, finally exacerbated by the interrogator's use of the petitioner's religious beliefs, rendered the statements involuntary.

II. PETITIONER WAS PREJUDICED BY THE DECISION OF THE COURT BELOW

Since the government relied on the petitioner's statements to corroborate the victims' testimony and prove its case, a rehearing is required. There is no possibility that the statement and detailed confession were unimportant to the members in determining guilt. *Bumper v. North Carolina*, 391 U.S. 543 (1968). The error in admitting petitioner's oral

---

[4] The "GT" score is a rough measure of intelligence. *See e.g.* United States v. Griffin, 15 C.M.A. 135, 35 C.M.R. 107, 111-12 (1964); United States v. Molinary-Rivera, 13 M.J. 975, 976 (A.C.M.R. 1982).

and written admissions was not harmless since " 'there is a reasonable possibility that [the coerced statements] might have contributed to the conviction.' " *Chapman v. California*, 386 U.S. 18, 23 (1967), *quoting Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). Coerced confessions violate "constitutional rights [which] are so basic to a fair trial that their infraction can never be treated as harmless error. . . ." *Chapman v. California*, 386 U.S. at 23 (footnote omitted). Petitioner's involuntary confession was so detailed and in such conflict with his testimony at trial that it is inconceivable that it did not contribute to the conviction. Due process demands reversal and a rehearing.

CONCLUSION

For the foregoing reasons, including the importance of the constitutional issue involved, and the fact that the Court of Military Appeals decided the instant case in a manner which conflicts with the applicable decisions of the Court, the petition for certiorari should be granted. The question presented is substantial and of crucial public significance.

Respectfully submitted,

BROOKS B. LA GRUA
Colonel, Judge Advocate General's Corps (JAGC)
United States Army
Defense Appellate Division
Nassif Building
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

ARTHUR L. HUNT
Lieutenant Colonel, JAGC
United States Army

ANNAMARY SULLIVAN
Captain, JAGC
United States Army

DAVID L. CARRIER
Captain, JAGC
United States Army

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 50840.
CM 443811

UNITED STATES, APPELLEE

v.

RICHARD R. WHEELER,
PRIVATE FIRST CLASS, U.S. ARMY, APPELLANT

April 28, 1986

For Appellant: *Colonel Brooks B. La Grua* (argued); *Colonel William G. Eckhardt, Lieutenant Colonel William P. Heaston, Captain Donna Chapin Maizel* (on brief); *Major Edwin D. Selby* and *Captain David L. Carrier.*

For Appellee: *Major Larry D. Williams* (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Major Joseph A. Rehyansky* (on brief).

Amicus Curiae On Behalf of Appellant: Michael Kaye, Esq. (on brief); *Paul Oller,* Legal Intern-For the Washburn Law Clinic, Washburn University School of Law.

Opinion of the Court

EVERETT, Chief Judge:

Appellant was tried by a general court-martial at Fort Lewis, Washington, on December 13, 1982. Contrary to his pleas, the members of this court-martial found appellant guilty of two specifications of rape[1] and one specification of forcible sodomy, in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925, respectively. The sentence adjudged was dishonorable discharge,

[1] Another specification alleging rape was dismissed by the military judge for lack of subject-matter jurisdiction. *Cf. O'Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969).

confinement for life, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved this sentence; and the Court of Military Review affirmed. 18 M.J. 823 (1984).

The Court granted review on the following issue of law:

> WHETHER THE APPELLANT'S STATEMENT WAS THE PRODUCT OF PSYCHOLOGICAL COERCION AND THEREFORE INVOLUNTARY.

We hold that appellant's pretrial statements[2] were voluntary and therefore admissible against him at this court-martial. *See* Art. 31(d), UCMJ, 10 U.S.C. § 831(d); *United States v. Murphy*, 18 M.J. 220, 235 (C.M.A.1984) (Everett, C.J., and Fletcher, J., concurring in the result.)

The relevant facts, as summarized by the Court of Military Review, are these:

> On 15 September 1982, after having been identifed as the principal suspect in the second incident, appellant was taken into custody for questioning by military and civilian criminal investigators. Before interrogating him, both investigators advised appellant of his rights to remain silent and to obtain counsel, which appellant waived. Initially denying that he committed the offenses against Miss N., appellant eventually admitted to Special Agent Herring of the Fort Lewis Criminal Investigation Division that he was the perpetrator.
>
> Special Agent Herring testified that he did not unlawfully coerce appellant into confession, but that:
>
> > I basically appealed to his conscience, and told him that I didn't believe his stories that he'd been giving us up until then and he, at first, denied any involvement and then he said that he'd been praying to God alot about his problem, and that was the first kind of admission that he gave to me at all.

---

[2] A typed pretrial statement contained a confession to the rape alleged in the specification dismissed for lack of jurisdiction. *See* n. 1, *supra*. In addition, Wheeler made various oral admissions relevant to the offenses of which he was convicted.

> Q. What did he say?
> A. He said that–his exact words were, "I've been praying to God a lot about my problem," without saying what the problem was. I understood it to be his crime. And, at that point I said, "Yes, I know that you have a problem, and you know that you have a problem and God knows that you have a problem." Tears welded [sic] in his eyes, and he continued saying things to the effect that he'd been praying a lot about it, and I said, "Would you be willing to pray to God right now to give you the strength to go ahead and get this off your chest and start living your life and turning your life around?" I got down on my knees with him and he was crying there, and he turned his head upward and said, "*I didn't mean to do it. I didn't mean to attack those women,* God, I need help and strength." And that lasted 30 seconds or so. We got back in our chairs and he drew his strength back up again and stopped crying, and looked at me and said, *"You're right. What you said was true. I did do it."*

18 M.J. at 824 (emphasis added).

At trial appellant moved to suppress his pretrial statements because they were induced by a CID agent's promise of help from a psychiatrist and because he had not been made aware that he could terminate the interview at any time. However, Special Agent Dale Herring, who conducted the interview, testified that no promise of psychiatric assistance was made to appellant and that he had responded to appellant's *post-confession* inquiry for psychiatric assistance by advising him to contact his unit or stockade personnel. Herring further testified that Wheeler had been fully advised of his legal rights, including the right to terminate the interview at any time, and had indicated that he understood these rights. The military judge found against appellant on this issue as a matter of fact; and we perceive no reason to overturn the ruling. *See United States v. Schneider*, 14 M.J. 189, 195 (C.M.A.1982). *See also Castleberry v. Alford*, 666 F.2d 1338, 1342, 1343 (10th Cir.1981).

Before the Court of Military Review, appellate defense counsel expanded the objection that appellant's statement had been improperly induced. He argued that Agent Herring's appeal to appellant's religious beliefs was psychologically coercive in view of his youth, limited intelligence, mental disorder (schizotypal personality) and his "Judeo-Christian" belief in "the cleansing power of confession." Accordingly, he concluded that a confession extracted in this manner under these circumstances was involuntary. *See Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966); *Gessner v. United States*, 354 F.2d 726 (10th Cir. 1965). *See also Brewer v. Williams* 430 U.S. 387, 412, 97 S.Ct. 1232, 1246, 51 L.Ed.2d 424 (1977) (Powell, J., concurring).

Before this Court, appellant again contends that the totality of circumstances dictates the conclusion that his confession was involuntary. In its brief, amicus curiae also suggests that this Court establish a "bright line" rule forbidding invocation of an accused's religious beliefs by government agents in attempting to secure a confession. *See People v. Adams*, 143 Cal.App.3d 970, 192 Cal.Rptr. 290 (1983). However, we are not inclined to hold that an appeal to one's religious convictions is so inherently coercive that subsequently-obtained confessions are *per se* involuntary. *Cf. Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). If this were true, the Supreme Court in *Davis v. North Carolina* and *Brewer v. Williams*, both *supra*, and the Court of Appeals in *Gessner v. United States supra*, could have decided those cases without reference to other circumstances involved. Although we recognize that such an appeal can combine with other circumstances to produce an involuntary confession, *id.*, our examination of the record (*see Davis v. North Carolina, supra*, 384 U.S. at 741-42, 86 S.Ct. at 1764), leads us to agree with the military judge[3] and the Court of Military Review that appellant's confession was voluntary.

---

[3] Under the Military Rules of Evidence in effect at the time of appellant's trial, the members no longer determined the admissibility of a confession. Mil.R.Evid. 304(e)(2); *see also* Drafters' Analysis, App. 22, Manual for Courts-Martial, United States, 1984; S. Saltzburg, L. Schinasi, D. Schlueter, *Military Rules of Evidence Manual* 80-81 (1981).

In reaching this conclusion, we first note that appellant testified that his confession was induced by the CID agent's promise of the assistance of a psychiatrist. Although this testimony was rejected by the trial judge as a matter of fact, Wheeler's failure even to mention Herring's religious appeal indicates that it could have had only minor impact, *Cf. Barrera v. State,* 99 Wis.2d 269, 298 N.W.2d 820, 830 (Wis.1980). Second, appellant voluntary waived his Article 31 rights and consented to answer the CID agent's questions before the topic of religion had been mentioned. *Cf.* III Wigmore, *Evidence* § 840 (Chadbourn rev. 1979). This conduct, coupled with his later statements, is consistent with a self-induced decision to speak. Third, it was Wheeler, not the investigator, who injected the topic of religion into the interrogation process. While this fact does not rule out the possibility of psychological coercion, it reduced the likelihood that the interrogator was using a religious appeal as a means to destroy Wheeler's freedom of will. Fourth, Herring's appeal to appellant's religious beliefs – which were not detailed on the record – was general in nature and amounted to no more than an appeal to his conscience. As pointed out by Justice Frankfurter in *Culombe v. Connecticut,* 367 U.S. 568, 576, 81 S.Ct. 1860, 1864, 6 L.Ed.2d 1037 (1961), "The police may be midwife to a declaration naturally born of remorse, or relief, or calculation." Finally, the interrogation lasted for but one hour (*cf. Davis v. North Carolina, supra*); appellant was fully advised of his rights by both a civilian investigator and a military investigator (*cf. Gessner v. United States, supra*); and his age of 22 and high school education suggest no defect in maturity or intelligence. *Cf. Culombe v. Connecticut, supra.*[4]

---

[4] We have considered the testimony of the psychiatrist offered by the defense during the sentencing portion of appellant's court-martial. This testimony was not directed towards his capacity to give a voluntary confession or whether he did so in this case. In any event his psychiatric condition – neither by itself nor with other factors in this case – rendered his confession involuntary. *Cf. Blackburn v. Alabama,* 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960).

In summary, the religious beliefs of appellant may have motivated him to make his confession. *See* O. Rogge, *Why Men Confess* 210-12 (Thomas Nelson & Sons, New York, 1959). However, a confession so motivated is neither unreliable (*see* Wigmore, *supra,* § 840) nor involuntary. *See generally Oregon v. Elstad,* ___ U.S. ___, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985). Moreover, no authority has been presented to this Court which convinces us that a person with religious beliefs is *per se* incapable of making a voluntary confession. *See Barrerra v. State, supra* 298 N.W.2d at 831[5]. Where the appeal to religious beliefs amounts to "no more persuasion to the defendant than the usual adjuration . . . to speak the truth," no improper inducement occurs. *Smith v. State,* 248 Ala. 363, 27 So.2d 495, 497 (1946). While there is the possibility that a religious appeal by itself or in conjunction with other circumstances might cross the line of intimidation (*see* Wigmore, *supra,*) we conclude this was not true in appellant's case.

The decision of the United States Army Court of Military Review is affirmed.

Judge COX concurs.

---

[4] To whatever extent *People v. Adams,* 143 Cal.App.3d 970, 192 Cal.Rptr. 290 (1983), suggests the contrary, we disagree with that precedent.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

CM 443811

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS RICHARD R. WHEELER,
SSN 291-62-3061, UNITED STATES ARMY, APPELLANT

---

20 Aug. 1984

Captain Donna Chapin Maizel, JAGC, argued the cause for the appellant. With her on the brief were Lieutenant Colonel William P. Heaston, JAGC, and Major Edwin D. Selby, JAGC.

Captain Debbie J. O'Bryan, JAGC, argued the cause for the appellee. With her on the brief were Colonel James Kucera, JAGC, Captain Thomas E. Booth, JAGC, and Major David E. Wilson, JAGC, USAR.

Before McKAY, PAULEY and WERNER, Appellate Military Judges.

OPINION OF THE COURT

WERNER, Judge:

Contrary to his pleas, appellant was convicted by a court-martial with members of raping a woman in August 1982 and of raping and sodomizing another woman one month later in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925. The approved sentence provides for a dishonorable discharge, confinement at hard labor for life, total forfeitures and reduction to Private E-1.

Among the errors assigned by appellant are: that his conviction was based upon an involuntary confession unlawfully obtained through psychological coercion; that the military

judge erred by improperly instructing the court members concerning the appellant's eligibility for parole; and that his counsel was ineffective. We find each of these contentions to be without merit.

I. VOLUNTARINESS OF THE CONFESSION

At 2230 hours, 7 August 1982, appellant abducted Miss Terri C. in her car while she was stopped for a traffic light on a street in Tacoma, Washington. For the next four hours, during which he drove around Tacoma and on Fort Lewis, Washington, appellant threatened and berated Miss C., forced her to undress and lie on the floor of the vehicle, locked her in the trunk of her car and twice raped her.

At 0300 hours, 9 September 1982, the appellant employed a similar *modus operandi* to abduct, rape and sodomize Miss Grace N. This incident lasted for about two and one-half hours and also occurred in Tacoma and on Fort Lewis. On 15 September 1982, after having been identifed as the principal suspect in the second incident, appellant was taken into custody for questioning by military and civilian criminal investigators. Before interrogating him, both investigators advised appellant of his rights to remain silent and to obtain counsel, which appellant waived. Initially denying that he committed the offenses against Miss N., appellant eventually admitted to Special Agent Herring of the Fort Lewis Criminal Investigation Division that he was the perpetrator.

Special Agent Herring testified that he did not unlawfully coerce appellant into confession, but that:

> I basically appealed to his conscience, and told him that I didn't believe his stories that he'd been giving us up until then and he, at first, denied any involvement and then he said that he'd been praying to God alot about his problem, and that was the first kind of admission that he gave to me at all.
>
> Q. What did he say?
>
> A. He said that – his exact words were, "I've been praying to God a lot about my problem," without saying what the problem was. I understood it to be his crime. And, at

> that point I said, "Yes, I know that you have a problem, and you know that you have a problem and God knows that you have a problem." Tears welded [sic] in his eyes, and he continued saying things to the effect that he'd been praying a lot about it, and I said, "Would you be willing to pray to God right now to give you the strength to go ahead and get this off your chest and start living your life and turning your life around?" I got down on my knees with him and he was crying there, and he turned his head upward and said, "I didn't mean to do it. I didn't mean to attack those women, God, I need help and strength." And that lasted 30 seconds or so. We got back in our chairs and he drew his strength back up again and stopped crying, and looked at me and said, "You're right. What you said was true. I did do it."

Appellant, on the other hand, characterizes Agent Herring's interrogation technique as psychological coercion. Appellant argues that his confession was involuntary since Herring only obtained it after inducing him to seek divine forgiveness, thereby capitalizing on his religious beliefs. *See* Military Rule of Evidence 304(c)(3). We disagree. In the first place, the discussion of religion was initiated by the appellant – not Agent Herring. Furthermore, an examination of the context in which the discussion occurred supports the conclusion that appellant was attempting to unburden himself of guilt, and was not bowing under the pressure of police interrogation. Under the circumstances, we are convinced, as was the trial judge who had the opportunity to observe the interrogator's demeanor while testifying, that appellant was not unlawfully coerced into confession. *See United States v. Schneider*, 14 M.J. 189, 195 (C.M.A.1982); *United States v. Schuring*, 16 M.J. 664, 669 (A.C.M.R.1983).

II. INSTRUCTIONS CONCERNING PAROLE ELIGIBILITY

Appellant contends that the military judge erred when, in response to a court member's question concerning elibility for parole, he stated:

> All right. First of all, parole is available to an accused who is serving confinement, including life imprisonment. And it varies upon the length of the sentence. Of course,

that's only for those eligible for consideration of parole. It also depends upon the conduct of the accused, so, I can't, and I won't give you a direct answer. I'm not going to tell that parole is available in x period of time. Because I can't tell you what the conduct of the accused is going to be. Parole is available to an accused sentenced by a military court including life imprisonment. You should determine, in terms of confinement, what you feel is appropriate for this accused. Under these circumstances, don't be concerned about the impact of parole. Just realize that it is available, in every single case, including a sentence to life. When selecting an appropriate sentence, you should select a sentence which will best serve the end of good order and discipline, the needs of the accused, and the welfare of society. I really don't think I can give you any more of a specific answer, Colonel A.. Any objections to the instructions I've just given?

Essentially, appellant's argument is that the military judge's instruction violated the holding of the Court of Military Appeals in *United States v. Ellis*, 15 U.S.C.M.A. 8, 34 C.M.R. 454 (1964). We disagree. In *Ellis* a law officer's presentencing instructions were condemned because they adjured the court members to take into account possible mitigating action by convening and other appellate authorities in arriving at an appropriate sentence. Besides tending to result in harsher punishments, the instructions violated paragraph 76(a)(4) of the Manual for Courts-Martial, United States, 1951, which provides that: ". . . Courts will . . . exercise their own discretion, and will not adjudge sentences known to be excessive in reliance upon the mitigating action of the convening or higher authority."

The instruction in this case is easily distinguishable and therefore compels a different result. Instead of advising the court members to consider the ssibility of parole in arriving at a sentence, the military judge expressly stated that they should not "be concerned about [its] impact." Any ambiguity as to the meaning of this language is readily dispelled by examining it in the context in which it was spoken. The fact that the trial defense counsel neither objected to the language nor

requested supplementary *voir dire* is also evidence of its clarity and harmlessness. "Normally, failure to make a timely objection where harmful affects [sic] can be ameliorated by prompt instructions, raises the doctrine of waiver." *United States v. Kiddo*, 16 M.J. 775, 776 (A.C.M.R.1983), *pet. denied* 18 M.J. 5 (C.M.A.1984). Our decision need not rest on that ground, however, since we are satisfied that the judge's instruction was not improper. *See Kiddo; United States v. Cain*, 5 M.J. 844, 848–49 (A.C.M.R.1978).

III. EFFECTIVENESS OF COUNSEL

Finally, we disagree with appellant's contention that he was denied effective assistance of counsel at trial. We recently enumerated the criteria for resolving issues of this kind in *United States v. Bowie*, 17 M.J. 821, 823–24 (A.C.M.R.1984):

> To prevail on a claim on ineffective assistance of counsel, an appellant must first prove that his attorney failed to perform with the degree of skill and diligence with which a competent attorney would perform under similar circumstances. Secondly, the appellant must establish that he was materially prejudiced in the defense of his case by his counsel's incompetence. (Citations omitted.)

Since our decision in *Bowie*, the Supreme Court held in *Strickland v. Washington* ___ U.S. ___, ___, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 680 (1984), that before a conviction will be reversed on the grounds of ineffective assistance of counsel, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Appellant argues that his attorney was ineffective in that he did not adequately prepare for either the merits or the sentencing portion of the trial. It appears from the record, however, that appellant's dissatisfaction with his attorney was misplaced. It is more likely that he was unhappy about the strength of the case against him, something over which his attorney had no control. *See United States v. Hancock*, 49

C.M.R. 830, 831 (A.C.M.R. 1975); *United States v. Zuis*, 49 C.M.R. 150, 154 (A.C.M.R.1974). First of all, appellant had admitted to a police investigator that he was the perpetrator of several of the violent crimes for which he stood trial. Extrinsic evidence corroborated that confession. Second, in a psychiatric evaluation, he had been diagnosed as being afflicted with a type of personality disorder that rarely responds to treatment. Third, he could only provide his attorney with names of character witnesses whose testimony was unlikely to help him during the extenuation and mitigation portion of the trial. The affidavits appellant submits in support of his contention do not show that defense counsel performed his duties with a lack of skill or diligence and there is absolutely no evidence that appellant's counsel committed errors so egregious as to cause his client to be unfairly convicted. Since appellant had not shown that his attorney performed incompetently, we can not find that he was denied effective assistance of counsel at trial. *See United States v. Bigger*, 2 U.S.C.M.A. 297, 301, 8 C.M.R. 97, 101 (1953).

As a final matter, we find the sentence to confinement for life wholly appropriate in this case. We reject appellant's assertion that his punishment is excessive because his victims did not suffer permanent physical injury from the rapes. In just one month, in a detached and calculated manner, appellant kidnapped, brutalized and violently raped or sodomized two different women. The Fort Lewis military community, "through the voice of the court members, has expressed its 'moral outrage' at appellant's crimes." *United States v. Hutchison*, 15 M.J. 1056, 1068 (N.M.C.M.R.1983). We agree with their sentence. Appellant's reprehensible conduct can not be tolerated in a civilized society.

The findings of guilty and the sentence are affirmed.

Senior Judge McKAY and Judge PAULEY concur.

U.S. GOVERNMENT PRINTING OFFICE: 1986—157-911/21024